IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 2

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Nature of the Proceeding

The Government, as its brief on reargument makes clear, is essentially in accord with petitioner on the two additional, specific questions propounded by the Court last Term. First, the Government disclaims any direct reliance on the required records doctrine announced in *Shapiro* v. *United States,* 335 U. S. 1 (1948) (Govt. Rearg. Br. 8).[1] Second,

[1] References are indicated as follows:
References to the numbered pages of the Government's brief on reargument, this Term (Govt. Rearg. Br. ——).
References to the numbered pages of the Government's brief in *Costello* v. *United States,* No. 3, this Term (Govt. Br. ——).
References to the numbered pages of petitioner's brief, last Term (Pet. Br. ——).
References to the numbered pages of petitioner's supplemental brief, this Term (Pet. Supp. Br. ——).

the Government recognizes that all information required by 26 U. S. C. §4412 and Form 11-C must be furnished in order to satisfy the obligation to pay the special occupational tax required by 26 U. S. C. §4411 (Govt. Rearg. Br. 38).

While admitting that *Shapiro* has no direct application here, the Government suggests that *Shapiro*'s underlying rationale indirectly bolsters the *Kahriger-Lewis* doctrine (Govt. Rearg. Br. 12), which the Court desires to review. And while admitting that registration and filing of the return must accompany payment of the special occupational tax, the Government repeatedly characterizes the information called for as "minimal" (Govt. Rearg. Br. 6, 7, 15, 27, 28, 29, 38) so as to justify the encroachment on the privilege involved here.

With the area of disagreement between the parties now more closely defined, petitioner, by way of reply, analyzes the Government's most recently articulated position to demonstrate that neither *Shapiro,* as the Government now applies it, nor the claimed "minimal" amount of information sought by the wagering tax laws can breathe continued vitality into the *Kahriger-Lewis* doctrine or justify the alternative, use-restriction rule which the Government requests.

I.

The Underlying Rationale of *Shapiro* Does Not Warrant Retention of the *Kahriger* and *Lewis* Cases.

The Government recognizes that the required records doctrine does not deal with reports which must be filed, as distinguished from records which must be kept and which are subject to Government inspection (Govt. Rearg. Br. 10). Noting that the pertinent regulation in *Shapiro* required the keeping of "records of the same kind as [the regulated business] has customarily kept" (Govt. Rearg. Br. 10, n. 5), the Government concludes that the doctrine has no direct bearing on the validity of the wagering tax laws. In this respect the parties are in accord.

But the Government and petitioner part company as the Government expands its previous *Shapiro* position to argue that *Shapiro* justifies reading *Kahriger* and *Lewis* as making a proper accommodation between the Fifth Amendment privilege and the need for information in the context of this case (Govt. Rearg. Br. 14).[2] The Government ignores this Court's recent pronouncement that the Fifth Amend-

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[2] Last Term, the Government stated simply that there was no need for the Court to consider "any possible relationship between the privilege . . . and the so-called 'required records' doctrine . . . " (Govt. Br. 25, n. 24). Petitioner reasoned that this position of the Government was correct and that it followed logically from the implied rejection of *Shapiro* by the Court in *Kahriger*. In *Kahriger*, the Government argued extensively that *Shapiro* controlled (Reply Brief for United States 24-27). Although the Court made a "passing reference to *Shapiro*" (Govt. Rearg. Br. 11; n. 7) in *Kahriger*, it did not accept the Government's reliance on *Shapiro*. Certainly, nothing in more recent decisions justifies utilizing *Shapiro* to bolster *Kahriger* now.

ment permits "no balancing by the courts of the competing private and public interests" and affords "a witness the right to resist inquiry in all circumstances . . ." even if the Government is seeking his testimony in the name of "self-preservation, 'the ultimate value of any society.'" *Barenblatt* v. *United States*, 360 U. S. 109, 126, 128 (1959). Rather, the Government argues that the privilege against self-incrimination must be accommodated to justify the "minimal" amount of information required by the wagering tax laws (Govt. Rearg. Br. 45). The Government arrives at this position by a series of related claims, which petitioner reviews here:

A. *As to the Government's claim that the wagering tax laws are justified "since they serve a governmental interest separate and independent from an interest in the underlying activity."* (Govt. Rearg. Br. 15.) The independent governmental interest upon which the Government relies is, of course, its stated interest in raising revenue. But the Government makes no mention of how the mandatory public disclosure of wagering tax registrants, 26 U. S. C. §6107, is germane to its revenue raising interest:

> ". . . the statutory provision which throws records open to state prosecutors goes far beyond any federal interest in enforcing payment of the tax. Its only function is to compel gamblers to reveal their illegal activities; it adds nothing to the enforcement of the tax or to any other federal regulatory purpose." Comment, *Self-Incrimination and the Federal Excise Tax on Wagering*, 76 YALE L. J. 839, 846-847 (1967).

Moreover, the Government's valid-purpose claim mistakenly emphasizes one of the declared purposes of the

legislation, but ignores "that where legislative abridgement of 'fundamental personal rights and liberties' is asserted, 'the courts should be astute to examine the *effect* of the challenged legislation . . .'" *Shelton* v. *Tucker*, 364 U. S. 479, 489 (1960). (Emphasis added.)

In a host of situations a valid regulatory purpose has not saved legislation which results in incriminatory disclosures. Thus, the valid purpose of the Subversive Activities Control Act to prevent the world-wide Communist conspiracy from accomplishing its purpose in this country, *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, 94-96 (1961), did not justify the registration provisions struck down in *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965); the valid purpose of the National Firearms Act to raise revenue for the federal treasury, *Sonzinsky* v. *United States*, 300 U. S. 506 (1937), did not justify the registration which brings the illegal act of possession of firearms to the attention of the authorities, *Russell* v. *United States*, 306 F. 2d 402 (9 Cir. 1962); and the valid purpose of the Johnson Act to regulate interstate sales of gambling devices, *United States* v. *Five Gambling Devices*, 346 U. S. 441, 450 (1953), did not justify requirements for reporting sales of illegal gambling devices, *United States* v. *Ansani*, 138 F. Supp. 451 (N. D. Ill. 1955), aff'd 240 F. 2d 216 (7 Cir.), *cert. denied*, 353 U. S. 936 (1957).

Certainly, if petitioner were summoned before a tribunal gathering data for legislation and were asked the same questions contained on Form 11-C, none would gainsay his right to invoke the privilege even though the purpose of the inquiry was not to detect criminality on petitioner's

part and even though the valid purpose of the probe might be defeated by lack of evidence without petitioner's response.

One recent comment rejects the Government's thesis that a proper revenue purpose salvages the wagering tax laws:

> "The essential principle is simple: a statutory scheme which requires an individual to reveal actual or intended criminal activity is unconstitutional unless absolute immunity is given. This principle both defines and limits the application of the self-incrimination privilege toward compelled disclosures, at least in extreme cases like the wagering tax." Comment, 76 YALE L.J., *supra* at 845.

B. *As to the Government's claim that the payment of the tax and registration are non-compulsory* (Govt. Rearg. Br. 22-24). The Government seeks to avoid the impact of comparing the questions asked of the wagering tax taxpayer with similar questions asked of witnesses before any proper tribunal by arguing that the prospective taxpayer, unlike the prospective witness, can avoid incrimination by not gambling (Govt. Rearg. Br. 23, n. 21). Here again, the Government avoids the impact of *Albertson*.

If the Government's reasoning is sound, the *Albertson* registration provision would have been held valid since individual Communist Party members could have avoided registering or facing penalties for non-registration by terminating their membership in the Party. In *Albertson*, the Government recognized that termination of an individual's Party membership eliminated the need of that individual to register for the Party. 382 U. S. at 73, n. 5. It follows, then, that under *Albertson*, the responses called

for here are compulsory within the meaning of the Fifth Amendment, and what the Court said there is equally applicable here:

> " . . . if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." 382 U. S. at 78.

The Government's claim that there is no compulsion involved in the wagering tax registration requirement is based on the assertion that a potential gambler has notice that he is "required to comply with the federal tax measure." (Govt. Rearg. Br. 22.) As Professor Maguire pointed out:

> "This is surely fallacious. Proper notification may stave off a holding of failure in procedural due process; it cannot supply fundamental authority to command anything and everything." Maguire, EVIDENCE OF GUILT §2.09 (1959).

C. *As to the Government's fear that reversal of* Kahriger *and* Lewis *will constitute a threat to the collection of income taxes* (Govt. Rearg. Br. 25). The parties are in accord that the income tax situation involved in *United States* v. *Sullivan,* 274 U. S. 259 (1927)—where the questions "were neutral on their face," *Albertson* v. *Subversive Activities Control Board, supra,* 382 U. S. at 79—is distinguishable from the matters involved here (Govt. Rearg. Br. 24).

Recognizing that the difference in the income and wagering taxes "are not insubstantial and that an accommodation of the power to tax income with Fifth Amendment guar-

antees would not be directly impaired by a holding that the provisions involved in the instant cases are constitutionally invalid" (Govt. Rearg. Br. 24-25), the Government nevertheless asks the Court to retain *Kahriger* and *Lewis* so as not to jeopardize collection of income taxes from gamblers (Govt. Rearg. Br. 25).[3]

In this connection the Government emphasizes the need for self-reporting and voluntary compliance by taxpayers to our system of revenues (Govt. Rearg. Br. 13, 22, 25). In large measure, it is true, the United States has a system of taxation by confession. But it is the existence of the wagering tax laws—which the Government now seeks to sustain—not the recognition of the unconstitutionality of these laws—as petitioner urges—which presents the potential harm to the system of taxation by voluntary confession. For, as Mr. Justice Jackson recognized in his *Kahriger* concurrence, "It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation." 345 U. S. at 36.

To bolster its fear of potential harm to the income tax collections, the Government inaccurately summarizes petitioner's position as, "Here the contention, in essence, is

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[3] It is ironic that today the Government urges a fear of ~~protected~~ projected harm to the income tax revenue as a basis to sustain the validity of the wagering tax. At the time of the enactment of the legislation here challenged, the Government opposed the legislation on the very ground, *inter alia*, that it might cause gambling operators to "evade income taxes as well as the wagering taxes." *Hearings Before the Permanent Subcommittee on Investigation of the Committee on Government Operations*, U. S. Sen., 87th Cong., 1st Sess., Part I, 95 (1961).

that Congress cannot validly tax an activity that is unlawful under State law—because it is unlawful." (Govt. Rearg. Br. 25.) But this is not petitioner's position (Pet. Supp. Br. 13): On the contrary, the principles which petitioner urges here do "not bar the federal government from taxing gambling as a revenue measure. . . . What the government cannot do is compel information under one statute which necessarily admits the violation of an unrelated criminal statute: this is the essence of self-incrimination." Comment, 76 YALE L. J., *supra* at 847.[4]

Petitioner does not quarrel with the Government's request that, if the Court overturn *Kahriger* and *Lewis*, it do so in a fashion that will not *sub silentio* exempt gamblers

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[4] Contrary to the Government's assertion (Govt. Rearg. Br. 15), petitioner's position is consistent with the Court's limited grant of certiorari in this case. Petitioner maintains that because the wagering tax laws admit of no non-incriminating compliance they violate the constitutional privilege against self-incrimination. Petitioner's cause here is not founded on the principle that Congress cannot tax gambling activity, since petitioner's Tenth Amendment question was not accepted for review. As this Court has made clear, it "will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects." *Aptheker* v. *Sec'y of State*, 378 U. S. 500, 515 (1964).

Petitioner detailed the operation of the wagering tax laws to demonstrate that they operate upon "a highly selective group inherently suspect of criminal activities . . . " and against "an area permeated with criminal statutes . . . " *Albertson* v. *Subversive Activities Control Board, supra*, 328 U. S. at 79, not to discuss Congress' power *per se* to tax illegal activity (Pet. Supp. Br. 6-14).

Furthermore, contrary to the Government's assertion (Govt. Rearg. Br. 16, n. 14), petitioner does not state that the Treasury regulations contemplate passing the tax on to the person placing the bet. Rather, as petitioner noted (Pet. Supp. Br. 10, n. 6), only where the underlying activity is legal, i.e. Nevada, can the 10 per cent excise tax, as a practical matter, be passed on to the person placing the bets. This is still further evidence that the taxes operate upon an area permeated with criminal statutes.

from income taxation (Govt. Rearg. Br. 26). Nor does this pose a difficult task. It merely entails prohibiting incriminating disclosures from a "highly selective group inherently suspect of criminal activities," *Albertson* v. *Subversive Activities Control Board, supra,* 382 U. S. at 79. As in *Albertson,* where the "risks of self-incrimination which the petitioner takes in registering are obvious," 382 U. S. at 77, there is here no need to fear the effect of the "conjurer's circle," which Mr. Justice Holmes condemned in *United States* v. *Sullivan, supra,* 274 U. S. at 264. While the Court could reasonably fear use of a mystical circle as claimed justification for non-disclosure of all essentially neutral inquiries on an income tax form, any fear of such a device is unrealistic when the inquiries are directed to an area, as here, "permeated with criminal statutes," 328 U. S. at 79, and where any disclosure is incriminating. The demise of *Kahriger* and *Lewis,* then, need have no effect on the collection of the income tax.

To sustain *Kahriger* and *Lewis,* on the other hand, does nothing to enhance the self-confession aspects of tax administration so vital in the income tax context in this country (Govt. Rearg. Br. 25). Moreover, it sanctions use of a tax measure which necessarily requires self-confession to crime. This is hardly a "realistic accommodation with Fifth Amendment guarantees" as the Government claims (Govt. Rearg. 22).[5]

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[5] The Government suggests that if the present legislation is upheld, Congress would be unable to impose a similar tax scheme upon "kidnappers and robbers," because they are less organized than gamblers (Govt. Rearg. Br. 20). The Government makes no mention of the organization of such businesses as prostitution, receiving stolen goods or peddling stolen cars. This discussion, moreover, is besides the mark because, as noted, the question here does not involve the Congressional power to tax, but the type of disclosures required and the nature of the underlying activity involved. When

II.

The Classification Of The Information Compelled By The Wagering Tax Laws As "Minimal" Does Not Warrant Retention Of The *Kahriger* and *Lewis* Cases.

The Government recognizes that registration under 26 U. S. C. §4412 must accompany payment of the special occupational tax under §4411. In this respect the parties are in accord. But when the Government urges repeatedly that the required information is "minimal" and seeks to use this label as justification for the incriminatory tax scheme here involved (Govt. Rearg. Br. 6, 7, 15, 27, 28, 29, 38), the parties are at issue.

It is difficult to justify the "minimal" classification. Form 11-C, which the Government concedes must be completed, calls for the taxpayer's name, alias, residence address, business address, names and addresses of all employees, agents and principals and a statement as to whether the taxpayer is in the business of accepting wagers.

Moreover, 26 C. F. R. §44.4412-1 (b) (2) requires a person subject to the wagering tax who engages an employee to submit that employee's name within 10 days after the employee is engaged. Related statutes require the keeping of a "daily record showing the gross amount of all wagers . . . ," which with other records "may be examined and inspected as frequently as may be needful to the enforcement of this chapter." 26 U. S. C. §§4403, 4423.

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the registration requires disclosures relating to an activity which, as the Government recognizes, "is unlawful in all but one of the States, and some of the interstate aspects of which are made criminal under federal law" (Govt. Rearg. Br. 24), the scheme necessarily runs afoul of the privilege, without regard to the degree of organization of the activity which is taxed.

Far from having "minimal" effect upon the wagering tax taxpayer, the disclosure in response to the statutory scheme here involved, if not an outright admission of violations of anti-wagering or conspiracy laws, would constitute at the very least "a link in a chain of evidence" sufficient to connect the taxpayer with such violations. *Hoffman* v. *United States*, 341 U. S. 479, 486 (1961). Compliance with the wagering tax laws "'"cannot possibly have . . . [anything but a] . . . tendency to incriminate."'" *Malloy* v. *Hogan*, 378 U. S. 1, 12 (1964).

III.

Adoption Of The Government's Suggested Use-Restriction Rule Would Constitute An Unwarranted Dilution Of The Privilege Against Self-Incrimination.

Although recognizing a basic right to remain silent afforded by the Fifth Amendment (Govt. Rearg. Br. 27), the Government alternatively urges adoption of a use-restriction rule, based upon *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 78-79 (1964), which would eliminate that right to silence as the proper scope of protection for the privilege in the context of the wagering tax laws.

As pointed out last Term, in no case before or after *Murphy* has the Court—in a situation where at the time of judicial review the silence has not yet been broken—adopted a use-restriction rule (Pet. Br. 12-13). In *United States* v. *Blue*, 384 U. S. 251 (1966) and *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), as well as in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the traditional right to silence could not be observed because when review occurred the silence had already been broken. As the Government recognized,

the Court could, "as a practical matter, focus only upon the point of attempted use" (Govt. Br. 20).

On the other hand, where, as here, silence has not been violated when review of the privilege issue occurs, the right to silence has generally been maintained by this Court. Thus, in *Malloy, Albertson* and *Spevack* v. *Klein*, 385 U. S. 511 (1967), the right to silence based on the Fifth Amendment privilege was upheld. In none of these cases did the Court order disclosure by the proponent of the privilege with a correlative restriction on the use of the disclosed information.[6]

Murphy, the lone exception, was fashioned to avoid the choice of repealing all state immunity statutes on the one hand, Sobel, *The Privilege Against Self-Incrimination 'Federalized,'* 31 BROOKLYN L. REV. 1, 46 (1964), or permitting the states to grant "'immunity baths'" from federal prosecution on the other hand. Note, *Counselman, Malloy, Murphy, and the State's Power to Grant Immunity*, 20 RUTGERS L. REV. 336, 345-346 (1966). This case presents no such choice.

The Government recognizes the conflict between its use-restriction rule and the Congressional policy for mandatory public disclosure of wagering tax information pur-

[6] The Government suggests petitioner's use of *Spevack* is misplaced because of Mr. Justice Fortas' suggestion in his concurrence that "if the 'required records' doctrine . . . had been applicable . . . he might be compelled to affirm a disbarment order where an attorney refused to keep pertinent records or produce them . . . " (Govt. Rearg. Br. 36, n. 33). But, if the required records doctrine had applied, then the underlying records would not have been privileged. Mr. Justice Fortas did not quarrel with the remand order in *Spevack;* he did not state that on remand Spevack should be compelled to produce the records, but be protected from the use of the records against him. Instead he stated, "I join in the order of the Court," 385 U. S. at 520.

suant to 26 U. S. C. §6107. It offers to ask Congress to amend §6107 to be consistent with its requested rule (Govt. Rearg. Br. 34). But at present, then, as in *Albertson,* "the Government's argument would do violence to the congressional scheme." 382 U. S. at 77. "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of the statute." *Scales* v. *United States,* 367 U. S. 203, 211 (1961).

Even if the Court expands *Murphy* as the Government requests, petitioner's convictions should, contrary to the Government's position (Govt. Rearg. Br. 41, n. 39), be set aside. What the Government asks in its alternative argument is that *Irvine* v. *California,* 347 U. S. 128 (1954)—which sanctioned the use of wagering tax information in criminal prosecutions—be overruled. At the time he was required to pay the tax and register, then, petitioner, like the witness in *Murphy,* had every reason under *Irvine* to fear incrimination by compliance. Neither petitioner nor the witness in *Murphy* could reasonably anticipate a new doctrine insulating compelled responses from further use. It follows, then, that even if the *Murphy* exclusionary rule is adopted, petitioner's convictions, like the judgment of contempt against the witnesses in *Murphy,* cannot stand.[7]

There is here

[7] ~~Here is fear~~ no "inter-jurisdictional clash of policies" sufficient to justify a *Murphy*-type exclusionary rule, as the Government claims (Govt. Rearg. Br. 31). *Murphy* is, as noted, predicated on the need to save all state immunity statutes *not* on "the fear of incriminating use of the information required to be disclosed in a State prosecution," as the Government states. In *Malloy,* which was decided the same day as *Murphy,* it *was* the use of the information in a state prosecution which was feared. Yet, in *Malloy* the right to silence was upheld, thus demonstrating the limited scope of the use-restriction rule in *Murphy.*

Conclusion

For these reasons, then, and for the reasons advanced in petitioner's earlier briefs, the judgments of the court below should be—and petitioner requests that they be—reversed with directions to enter judgments of acquittal.

Respectfully submitted,

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